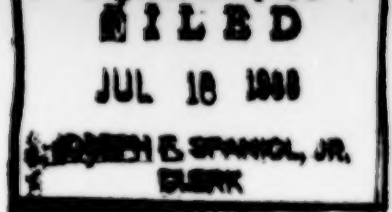


88-161



IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

COMMONWEALTH OF PENNSYLVANIA,

Petitioner

VS.

THOMAS A. BRUDER, JR.,

Respondent

---

PETITION FOR WRIT OF CERTIORARI TO THE

SUPREME COURT OF PENNSYLVANIA

---

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution require that a field sobriety test consisting of the recitation of the alphabet be preceded by warnings of the individual's rights against self-incrimination.

2. Whether the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution require that brief questioning at a routine traffic stop be preceded by warnings of the individual's rights against self-incrimination.

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IN THE SUPREME COURT  
OF THE UNITED STATES

OCTOBER TERM, 1988

NO. -----

COMMONWEALTH OF PENNSYLVANIA,  
Petitioner

VS.

THOMAS A. BRUDER, JR.,  
Respondent

PETITION FOR WRIT OF CERTIORARI  
TO THE SUPREME COURT OF PENNSYLVANIA

Petitioner, the Commonwealth of Pennsylvania, respectfully requests that a Writ of Certiorari issue to review the Judgment and Opinion of the Superior Court of Pennsylvania entered in this case.

### OPINIONS BELOW

The opinion of the Superior Court of Pennsylvania has been reported at 365 Pa.Super.Ct. 106, 528 A.2d 1385 (1987) and is set forth in full in Appendix A of this Petition.

The opinion of the Court of Common Pleas of Delaware County is reported at 73 Del.Co.Rptr. 485 (1986), and is set forth in full in Appendix C of this Petition.

### STATEMENT OF JURISDICTION

The judgment of the Pennsylvania Superior Court was entered on July 21, 1987. The Pennsylvania Supreme Court refused review of this matter by an Order dated May 19, 1988. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

## CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment Four,  
which provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment Five,  
which provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment Six,  
which provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been

previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

United States Constitution, Amendment  
Fourteen, Section One, which provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

### STATEMENT OF THE CASE

At approximately 12:50 A.M. on January 19, 1985, Officer Steve Shallis of the Newtown Township Police Department observed Thomas A. Bruder, Jr., driving a motor vehicle which was stopped at a green light for ten to fifteen (10-15) seconds. (N.T. December 17, 1985 p. 8). Bruder's vehicle then proceeded at approximately ten to twenty (10-20) miles per hour on a four-lane divided highway where the speed limit was forty (40) miles per hour, swerving back and forth across the highway with high beams on, despite warnings from oncoming traffic. Bruder drove on and made a right turn at a red light without coming to a stop, turning so widely he was travelling eastbound in the westbound lane. (Id. at 9-11). Officer Shallis then stopped Bruder's vehicle. Before the officer had stopped his police car, Bruder exited his vehicle and was unsteady on his feet, having a difficult time keeping his

balance. He also had difficulty removing his wallet from his pocket, looking for his driver's license, and finding his registration and insurance cards in the glove compartment. (Id. at 1214). He had a strong odor of alcohol on his breath, his eyes were bloodshot and his face was flushed. In response to questioning, Bruder admitted to the officer that he had had a couple of drinks. Bruder, a local businessman, then blurted to Officer Shallis, "You don't know who I am". (Id. at 16). Officer Shallis administered several field sobriety tests to Bruder. Officer Shallis first asked him to recite the alphabet, and then requested that he walk a straight line, heel-to-toe. After Bruder performed poorly on both tests, Officer Shallis placed him under arrest for Driving Under the Influence of Alcohol. Bruder refused to undergo any chemical tests to determine his blood alcohol level, despite being advised of the consequences of such a refusal. (Id. at 17).

Bruder filed Omnibus Pre-trial Motions seeking the suppression of evidence, alleging, inter alia, that certain field sobriety tests were administered without advising him of his Fifth Amendment rights as provided in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d. 694 (1966), and that statements elicited from him without first advising him of his rights against self-incrimination and to counsel violated the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. On June 25, 1985 a hearing was held on the pre-trial motions, at which Bruder raised the above federal constitutional claims. (N.T. June 25, 1985 p. 10-11). On July 26, 1985 the Court denied the pre-trial motions and filed Findings of Fact and Conclusions of Law, which are attached hereto as Appendix B.

On December 17, 1985, Bruder was found guilty of Driving Under the Influence of

Alcohol following a non-jury trial before the Honorable Rita E. Prescott. Bruder filed post-trial motions raising, inter alia, the federal constitutional claims he raised in his pre-trial motions. By an Order dated May 9, 1986 the Court dismissed the post-trial motions, and filed an opinion on May 14, 1986. A copy of that Opinion is attached hereto as Appendix C. On July 23, 1986, he was sentenced to a term of imprisonment of forty-eight (48) hours to six (6) months. Bruder took a direct appeal to the Superior Court of Pennsylvania, which reversed the judgment of sentence and remanded for a new trial in an opinion by a divided panel dated March 30, 1987. A copy of that Opinion is attached hereto as Appendix D. President Judge Cirillo, writing for himself and Senior Judge Hoffman, held (1) the roadside questioning of Bruder was constitutionally infirm due to a lack of Miranda warnings, Appendix at 6a-11a; 51a-56a and

Commonwealth v. Bruder, 365 Pa.Super.Ct. 106, 110-12, 528 A.2d 1385, 1387-88 (1987), and (2) a field sobriety test consisting of the recitation of the alphabet constituted testimonial evidence, which also required Miranda warnings. Appendix at 12a-14a; 57a-59a, and Commonwealth v. Bruder, supra. at 113-14, 528 A.2d at 1388. Judge Rowley filed a concurring and dissenting opinion, voting to affirm the Judgment of Sentence. The Commonwealth filed an Application for Reargument from this determination. The Superior Court, by Order dated June 8, 1987, denied reargument, but took the unusual action of sua sponte ordering panel reconsideration limited to the issue of the sufficiency of the evidence. A copy of that Order is attached hereto as Appendix E. On July 21, 1987 the panel found the evidence presented at trial sufficient to support the verdict, but again reversed the judgment of sentence, Judge Rowley again dissenting. A

copy of that Opinion is attached hereto as Appendix A. The Commonwealth filed a Petition for Allowance of Appeal in the Supreme Court of Pennsylvania. By an Order dated May 19, 1988, the Supreme Court denied the Commonwealth's Petition. A copy of that Order is attached hereto as Appendix F. The Commonwealth now seeks this Court's review of the Superior Court's Opinion and Order.

## REASONS FOR GRANTING THE WRIT

A. THE FOURTH, FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATE CONSTITUTION DO NOT REQUIRE THAT A FIELD SOBRIETY TEST CONSISTING OF THE RECITATION OF THE ALPHABET BE PRECEDED BY WARNINGS OF THE INDIVIDUAL'S RIGHTS AGAINST SELF-INCRIMINATION.

The Pennsylvania Superior Court has decided a question of federal law<sup>1</sup> in conflict with the applicable decisions of this Court by holding that a field sobriety test consisting of the recitation of the alphabet must be preceded by Miranda<sup>2</sup> warnings. The

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<sup>1</sup> The Superior Court opinion did not base its decision upon the Pennsylvania Constitution, nor did it make a plain statement that its decision was based on independent state grounds. The decision is thus presumed to be based on federal constitutional grounds. Delaware v. Van Arsdall, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d. 674 (1986).

<sup>2</sup> Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Superior Court's opinion is based on its holding that the recitation of the alphabet is testimonial in nature. This holding is in direct conflict with the prior decisions of this Court.

In United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967), this Court held that requiring a defendant to participate in a line-up and speak the words spoken by the perpetrator of the crime did not violate the defendant's right against self-incrimination. The Court concluded that Wade's voice was being used to identify physical characteristics and that he was not being compelled to utter statements of a testimonial nature. In United States v. Dionisio, 410 U.S. 1, 93 S.Ct. 764, 35 L.Ed.2d 67 (1973), the Court held that compelling voice exemplars does not violate a defendant's privilege against self-incrimination since the voice exemplars were used solely to measure the physical properties of the witness's voice,

not for the testimonial or communicative content of what was to be said.

The Pennsylvania Superior Court, in direct conflict with the holdings of this Court, based its decision solely on the fact the evidence in question came from the defendant's mouth. The Superior Court used an improper analysis. The mere fact that the evidence originated from the defendant's mouth is not the end of the analysis. Self-incrimination protections are only implicated when the evidence is testimonial or communicative. Schmerber v. California, 384 U.S. 757, 86 S.Ct 1826, 16 L.Ed.2d. 908 (1966), and it is the testimonial or communicative nature of the evidence which is the proper inquiry. Since the recitation of the alphabet is designed to test the degree to which a suspect's faculties are impaired, it is a physical test. No communicative value exists at all in the substantive sounds being uttered by the individual. In view of the applicable

decisions of this Court, the Pennsylvania Superior Court erred in concluding otherwise.

The instant matter is an appropriate case for this Court to review inasmuch as the precise issue presented has never been directly addressed by this Court, yet is important, in view of the large number of drunk driving cases occurring nationwide.<sup>3</sup>

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<sup>3</sup> This issue has not been directly addressed by most state courts, but all which have done so have held the recitation of the alphabet to be non-testimonial and not within the purview of the constitutional protections against self-incrimination. State v. Theriault, 144 Ariz. 166, 696 P.2d 718 (1984); People v. Helm, 633 P.2d 1071 (Colo. 1981); Oxholm v. District of Columbia, 464 A.2d 113 (D.C.App. 1983); Montgomery v. State, 174 Ga.App. 95, 329 S.E.2d 166 (1985); State v. Hartwig, 112 Idaho 370, 732 P.2d 339 (1987); People v. Saturday, 482 N.E.2d 1124 (Ill.App.2 Dist. 1985); McAvoy v. State, 70 Md.App. 661, 523 A.2d 618 (1987); People v. Burhans, 421 N.W.2d 285 (Mich.App. 1988); Butler v. Commissioner of Public Safety, 348 N.W.2d 827 (Minn. App. 1984); State v. Medenbach, 48 Ore. App. 133, 616 P.2d 543 (1980); State v. Roadifer, 346 N.W.2d. 438 (S.D. 1984).

B. THE FOURTH, FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION DO NOT REQUIRE THAT BRIEF QUESTIONING AT A ROUTINE TRAFFIC STOP BE PRECEDED BY WARNINGS OF THE INDIVIDUAL'S RIGHTS AGAINST SELF-INCRIMINATION.

The Pennsylvania Superior Court's holding that brief roadside questioning of a driver during a routine traffic stop must be preceded by Miranda warnings is in direct conflict with this Court's holding in Berkemer v. McCarty, 468 U.S. 427, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984), which held that Miranda warnings are not required in such circumstances. The Superior Court relied upon Commonwealth v. Meyer, 488 Pa. 297, 412 A.2d 517 (1980) in holding that the police should have given Bruder Miranda warnings prior to asking him questions during the traffic stop. This Court, however, specifically rejected Commonwealth v. Meyer and its

reasoning Berkemer v. McCarty, supra. at nn.7 and 8.

Since the Pennsylvania Superior Court has ignored the plain holding of Berkemer v. McCarty and instead followed federal law<sup>4</sup> which this Court rejected, it is respectfully submitted that the instant case is appropriate for review by this Court.

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<sup>4</sup> See Footnote 1, supra.

### CONCLUSION

For all the foregoing reasons, the Commonwealth of Pennsylvania respectfully requests that a Writ of Certiorari issue to review the decision below.

Respectfully submitted,

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### A P P E N D I X

COMMONWEALTH OF PENNSYLVANIA

v.

THOMAS A BRUDER, JR.,  
Appellant

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

NO. 02176 Philadelphia 1986

JUDGMENT

ON CONSIDERATION WHEREOF, it is  
now here ordered and adjudged by this Court  
that the judgment of the Court of Common  
Pleas of Delaware County be, and the same is  
hereby Reversed and Remanded for Further  
Proceedings. Jurisdiction Relinquished.

BY THE COURT:

David A. Szewczak  
Prothonotary

Dated: July 21, 1987

APPENDIX "A"

COMMONWEALTH OF PENNSYLVANIA

v.

THOMAS A. BRUDER, JR.,  
Appellant

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

NO. 02176 Philadelphia 1986

Appeal from the Judgment of Sentence July  
23, 1986 in the Court of Common Pleas of  
Delaware County, Criminal No. 303 of 1985

BEFORE: CIRILLO, P.J., ROWLEY AND  
HOFFMAN, JJ.

OPINION BY CIRILLO, P.J.:

This is an appeal from a judgment  
of sentence, following a non-jury trial, for  
driving under the influence of alcohol and  
related offenses. We reverse and remand.

The issues presented for our review  
are: (1) whether the criminal complaint should  
have been dismissed due to its defects; (2)  
whether certain evidence was properly  
admitted at trial; and (3) whether the verdict  
was supported by sufficient evidence.

A patrolman stopped appellant  
Bruder's car after the officer saw him pass a

red light. The patrolman also witnessed what  
he described as Bruder's erratic driving  
behavior. When the policeman approached  
Bruder, he noticed indicia of intoxication.  
The patrolman testified that Bruder was  
unable to walk in a straight line, heel to toe,  
or recite the complete alphabet. Appellant  
was then arrested for driving under the  
influence of alcohol, and informed of his  
rights as required by Miranda v. Arizona, 384  
U.S. 436, 467-73 (1966).

# I

Appellant argues that the complaint  
filed against him was defective and,  
therefore, should have been dismissed. More  
specifically, appellant asserts that the  
complaint violated Pennsylvania Rules of  
Criminal Procedure 132 and 134.

The alleged violation by the  
Commonwealth of Rule 132 was its failure to  
include a verification with the complaint.  
Rule 132(9) requires that every complaint  
include a "verification by the affiant that the

facts set forth in the complaint are true and correct to the affiant's personal knowledge or information and belief, and that any false statements therein are made subject to the penalties . . . relating to unsworn falsification to authorities . . ."

In the case at bar, the arresting officer, in filing the complaint, used an old form which was designed to conform to an older version of Rule 132. The complaint did not conform to the current version of Rule 132 because it did not contain the required clause that false statements were subject to the penalties of unsworn falsification.

The trial court found that based on Pa. R. Crim P. 150, the defect in the complaint did not warrant dismissal of the charges. Pa. R. Crim P. 150 provides that a "defendant shall not be discharged nor shall a case be dismissed because of a defect in the form or content of a complaint, summons or warrant, or a defect in the procedures of this chapter, unless the defendant raises the

defect before the conclusion of the preliminary hearing and the defect is prejudicial to the rights of the defendant."

The trial court noted that the defect concerning the absence of a verification was not raised in this case until after the preliminary hearing and suppression hearing. The trial court also observed, and we agree, that the appellant was aware of the charges against him and was not prejudiced by the defect in the complaint.

We express displeasure with the failure of the police to fully comply with the requisite form of a complaint. The plain language of Rule 150, however, does not permit us to discharge the complaint in this particular case because the defect was neither timely raised nor was it prejudicial to the appellant.

Appellant also contends that Pa. R. Crim. P. 134 was violated. Rule 134 provides that in any proceeding initiated by a complaint, the issuing authority shall

ascertain and certify on the complaint that there is probable cause, in the form of an affidavit, for the issuance of process.

Notwithstanding appellant's assertion to the contrary, we discern no language in the rule, or in the comments to the rule, which require the police to personally appear and verify the complaint before the district justice involved in the case. Because we find no violation of Rule 134, we cannot dismiss the complaint on this basis.

Appellant also argues that the defective complaint was a violation of Pa. R. Crim. P. 130(d). We need not address this argument due to our holding that there were no fatal defects in the instant complaint.

## II

Bruder argues that certain statements that he made after he was stopped, as well as the results of the field sobriety test, should have been suppressed.

When appellant's car was stopped,

appellant stepped out and approached the police vehicle. The police officer asked appellant for his driver's license, registration and insurance card. Appellant returned to his car to obtain the requested information. After appellant had provided this information, the police officer asked appellant whether he had been drinking and appellant responded that he had. The police officer also asked appellant where he was going. Appellant responded that he was going home. Bruder argues that these responses should be suppressed because they were made before he was advised of his rights pursuant to Miranda v. Arizona, 384 U.S. 436, 479 (1966).

Miranda warnings need be given only when one is subjected to custodial interrogation. Miranda v. Arizona, 384 U.S. 436, 444 (1966); Berkemer v. McCarty, 468 U.S. 420, 428-29 (1984). In order to determine whether the responses made by appellant before he received his Miranda warnings should have been suppressed, we

must decide whether they were elicited during custodial interrogation.

In Berkemer v. McCarty, 468 U.S. 420 (1984), the United States Supreme Court ruled that a motorist was not in custody when he was stopped by a police officer who asked "a modest number of questions and requested him to perform a simple balancing test visible to passing motorists." 468 U.S. at 442. As in the case at bar, the driver in McCarty, was stopped after being suspected of driving under the influence of alcohol, admitted that he had had a few drinks, and failed a balancing test before being advised of his Miranda rights. The Court in McCarty, however, refused to adopt a bright line test which would have definitively answered the question of whether Miranda applies to all traffic stops or whether a suspect need be advised of his rights only when he is formally placed under arrest. 468 U.S. at 441. Thus, we are afforded a measure of flexibility in deciding exactly when a suspect has been

taken into custody.

In Pennsylvania, "custodial interrogation does not require that police make a formal arrest, nor that the police intend to make an arrest . . . Rather, the test of custodial interrogation is whether the individual being interrogated reasonably believes his freedom of action is being restricted." Commonwealth v. Meyer, 488 Pa. 297, 307, 412 A.2d 517, 521 (1980) (quoting Commonwealth v. Brown, 473 Pa. 562, 570, 375 A.2d 1260, 1264 (1977)). Interrogation in this context is defined as questioning "expected to elicit a confession or other incriminating statements.'" Commonwealth v. Bracey, 501 Pa. 356, 367, 461 A.2d 775, 780 (1983) (quoting Commonwealth v. Sero, 478 Pa. 440, 453, 387 A.2d 63, 70 (1978)).

In Commonwealth v. Meyer, the Pennsylvania Supreme Court ruled that the driver of a car involved in an accident who was suspected of driving under the influence of alcohol and who was told by police to wait

at the scene until additional police arrived was in custody for purposes of Miranda. The Meyer court reasoned that because the defendant had a reasonable belief that his freedom of action had been restricted, statements elicited before he received his Miranda warnings should have been suppressed. 488 Pa. at 307, 412 A.2d at 522. See generally Annotation, Right of Motorist Stopped by Police Officers To Be Informed at That Time of His Federal Constitutional Rights Under Miranda v. Arizona, 25 A.L.R. 3d 1076 (1969) (cases collected).

We rely on Meyer in finding that Bruder reasonably believed that his freedom of action had been restricted. Undoubtedly, he was not free to leave when he made the statements elicited. That the policeman's questions were intended to elicit incriminating statements remains obvious. We cannot readily accept an alternative reason why Bruder was asked if he had been drinking. Thus, based on the reasoning in the Meyer,

case, we conclude that Bruder's response that he had been drinking should have been excluded as a statement made during custodial interrogation without the benefit of Miranda warnings. See generally McCarty, 468 U.S. at 441 n.34 (United States Supreme Court cites Meyer in connection with discussion which intimates that duration of and circumstances surrounding traffic stop impact on the determination of whether there was a custodial interrogation for purposes of providing Miranda warnings). As we have established that custodial interrogation existed at the point that Bruder was asked whether he had been drinking, the subsequent response concerning his destination should also have been excluded.

Bruder's statement, "You don't know who I am," was admitted into evidence over the objection of counsel. Although this statement was made before Bruder received his Miranda warnings, it was a spontaneous utterance not made in response to a question

by the police officer. In Commonwealth v. Bracey, 501 Pa. 356, 461 A.2d 775 (1983), the Pennsylvania Supreme Court ruled that a statement is admissible notwithstanding the lack of Miranda warnings if it was not given in response to police conduct which evoked an admission, or if it was freely given without compelling influences. Id. at 367, 461 A.2d at 780 (quoting Commonwealth v. Sero, 478 Pa. 440, 453, 387 A.2d 63, 70 (1978)). It is clear from the record that this particular statement by Bruder was freely made in the absence of evocative police conduct. Therefore, it was properly admitted.

After appellant informed the police officer that he had had a few drinks, the police officer asked the appellant to recite the alphabet and to walk in a straight line, heel to toe. Appellant argues that these field sobriety tests should be suppressed. It is settled in Pennsylvania that "(r)equiring a driver to perform physical tests . . . does not violate the privilege against self-incrimination

because the evidence procured is of a physical nature rather than testimonial, and therefore, no Miranda warnings are required." Commonwealth v. Benson, 280 Pa. Super. 20, 29, 421 A.2d 383, 387 (1980).

Although requiring Bruder to walk in a straight line was a physical test which need not have been preceded by Miranda warnings, we cannot readily reach the same conclusion regarding Bruder's recitation of the alphabet. Whereas the constitutional protection against self-incrimination which Miranda was designed to protect does not encompass physical evidence, it does refer to testimonial evidence. Benson, 280 Pa. Super. at 29, 421 A.2d at 387. "Testimonial evidence is communicative evidence as distinguished from demonstrative or physical evidence." Commonwealth v. Fernandez, 333 Pa. Super. 279, 284, 482 A.2d 567, 569 (1984).

We view the recitation of the alphabet as essentially communicative in nature. Therefore, because the recitation was

elicited before Bruder received his Miranda warnings, it should have been excluded as evidence. Benson, 280, Pa. Super. at 29, 421 A.2d at 387 (citing United States v. Wade, 388 U.S. 218 (1967); Schmerber v. California, 384 U.S. 757 (1966)). See Miranda, 384 U.S. at 479.

In order to reverse on the basis of the introduction of inadmissible evidence, we must find an abuse of discretion as well as a showing of actual prejudice resulting from the tainted evidence. Commonwealth v. Sweger, 351 Pa. Super. 188, 195, 505 A.2d 331, 334 (1986) (citing Lewis v. Prewitt, 337 Pa. Super. 419, 487 A.2d 16 (1985)); see also Commonwealth v. Smoyer, 505 Pa. 83, 88, 476 A.2d 1304, 1307 (1984) (effect of tainted evidence); Commonwealth v. Johnson, 227 Pa. Super. 96, 102-03, 323 A.2d 813, 816 (1974) (same).

Based on our analysis which determined that evidence obtained during Bruder's custodial interrogation was

inadmissible, we hold that it was an abuse of discretion to admit such evidence. Introduction of the tainted evidence was clearly prejudicial to Bruder because the absence of such evidence might very well have led to a different verdict. Thus, we must reverse and remand for proceedings consistent with this opinion.

### III

The last issue presented is whether there was sufficient evidence to find appellant guilty of driving under the influence of alcohol, 75 Pa. C.S. §3731.

Our standard of review for this issue is limited. We must "view the evidence in the light most favorable to the Commonwealth (as verdict winner) and, drawing all reasonable inferences therefrom favorable to the Commonwealth, determine if there is sufficient evidence to enable the trier of fact to find every element of the crime beyond a reasonable doubt." Commonwealth v. Stoyke, 504 Pa. 455, 462,

475 A.2d 714, 718 (1984) (citing Commonwealth v. Hudson, 489 Pa. 620, 414 A.2d 1381 (1980)).

Even though we have determined in part II of this opinion that certain evidence should not have been admitted, we also recognize that when reviewing the sufficiency of the evidence, the "entire record with all evidence actually received must be considered, whether or not the lower court's rulings thereon were correct." Commonwealth v. Minnis, 312 Pa. Super. 53, 55, 458 A.2d 231, 232 (1983). See Commonwealth v. Manhart, 349 Pa. Super. 552, 556, 503 A.2d 986, 988 (1986); see also Commonwealth v. Nelson, 320 Pa. Super. 488, 494, 467 A.2d 638, 641 (1983) (In passing upon the sufficiency of the evidence, we evaluate all of the evidence, whether erroneously received or not. The proper remedy for prejudicial error due to inadmissible evidence is grant of a new trial with such evidence excluded). In Minnis, we found that the record as a whole indicated

that the evidence was sufficient, but we reversed and remanded because we ruled that certain out-of-court identifications should have been suppressed.

We have the benefit of a recent consideration of the sufficiency of evidence in connection with 75 Pa. C.S. §3731, by the Pennsylvania Supreme Court in Commonwealth v. Griscavage, 512 Pa. 540, 517 A.2d 1256 (1986). The sole issue in Griscavage was whether there was sufficient evidence to establish guilt beyond a reasonable doubt on the charge of driving while under the influence of alcohol.

The Court stated that in order to establish the defendant's guilt, "the Commonwealth had to prove: (1) that he was operating a motor vehicle, (2) while under the influence of alcohol to a degree which rendered him incapable of safe driving." Griscavage, 512 Pa. at \_\_\_, 517 A.2d at 1258; 75 Pa. C.S. §3731(a)(1) (citations omitted). As in the case before us, there was no dispute in

Griscavage regarding the first element. With respect to the second element, the Court quoted an interpretation of the phrase "under the influence of alcohol," which, though based on a prior statute, is applicable to the current version of §3731(a)(1).

The statute does not require that a person be drunk, or intoxicated, or unable to drive his automobile safely in traffic, but merely that the Commonwealth prove beyond a reasonable doubt that the defendant was operating his automobile under the influence of intoxicating liquor . . .

The statutory expression "under the influence of intoxicating liquor" includes not only all the well known and easily recognized conditions and degrees of intoxication, but also any mental or physical condition which is the result of drinking alcoholic beverages and (a) which makes one unfit to drive an automobile, or (b) which substantially impairs his judgment, or clearness of intellect, or any of the normal faculties essential to the safe operation of an automobile.

Commonwealth v. Dougherty, 351 Pa. Super. 603, 609, 506 A.2d 936, 939 (1986) (Cirillo, J., now P.J.), we held that the evidence was sufficient to support a conviction under 75 Pa. C.S. §3731 where the defendant was observed operating a motor vehicle that was swerving from side to side. Upon stopping the vehicle in Dougherty, the police noticed the odor of alcohol and an accumulation of alcoholic beverages inside the vehicle. The driver in Dougherty did not perform well in field sobriety tests and had difficulty walking and standing upright without placing his hands on his vehicle. Although in the case before us there was no evidence of an accumulation of alcoholic beverages inside the vehicle, we find that the Dougherty case is substantially similar to the case at bar and we rely on it as a basis for our decision.

Based on our application of Griscavage and Dougherty, and viewing the evidence as a whole in the light most favorable to the Commonwealth, we conclude

Griscavage, 512 Pa. at \_\_\_, 517 A.2d at 1258 (emphasis in original) (quoting Commonwealth v. Horn, 395 Pa. 585, 590-91, 150 A.2d 872, 875 (1959)).

In the instant case, the record indicates that appellant had been drinking, had been driving erratically, and had performed poorly in field sobriety tests. The trier of fact concluded that those faculties essential to the safe operation of an automobile were substantially impaired by appellant's drinking.

The Griscavage, case instructs us to consider indicia of intoxication together with the other circumstances surrounding the traffic stop. Based on all the evidence presented in the trial court, these indicia and circumstances support an inference of substantial impairment of faculties sufficient to satisfy the test in Horn.

We recently upheld a conviction for driving under the influence in a case that was factually similar to the instant case. In

that there was adequate support for finding the appellant guilty of driving under the influence of alcohol. As we discussed earlier, however, and as we did no Minnis, we must still reverse and remand. See Nelson.

Reversed and remanded for proceedings consistent with this opinion. Jurisdiction is relinquished.

ROWLEY, J. files a Concurring and Dissenting Statement.

COMMONWEALTH OF PENNSYLVANIA

v.

THOMAS A. BRUDER, JR.,  
Appellant

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

NO. 2176 Philadelphia 1986

Appeal from the Judgment of Sentence July 23, 1986, in the Court of Common Pleas of Delaware County, Criminal Division, No. 303 of 1985.

BEFORE: CIRILLO, P.J., ROWLEY, and  
HOFFMAN, JJ.

CONCURRING AND DISSENTING STATEMENT  
BY ROWLEY, J:

While I agree with the majority's disposition of the first and third issues concerning dismissal of the criminal complaint and sufficiency of the evidence, I respectfully disagree with the conclusion that appellant's statements should have been suppressed under Commonwealth v. Meyer, 488 Pa. 297, 412 A.2d 517 (1980). I think that Meyer is distinguishable on its facts and that the facts in this case closely parallel those in Berkemer v. McCarty, 468 U.S. 420 (1984). Considering

also that the U.S. Supreme Court cited Meyer as an example of the confusion among various jurisdictions in applying Miranda v. Arizona, 384 U.S. 436 (1966) to situations involving motorists stopped for traffic violations, I think that Berkemer is controlling in this case. I would affirm the judgment of sentence.

IN THE COURT OF COMMON PLEAS OF  
DELAWARE COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA :  
vs. NO. 303-85  
THOMAS A BRUDER, JR. :

Jana Nestlerode, Esquire-Assistant District  
Attorney

Court House  
Media, PA 19063

Carmen Belefante, Esquire-Attorney for  
Defendant  
Lawyers Title Building, 214 N. Jackson St.  
Media, PA 19063  
PRESCOTT, J.  
CRIMINAL DIVISION

O R D E R

AND NOW, to wit, this 26th day of July,  
1985, a hearing having been held in open  
Court, pursuant to a Petition to Suppress  
filed on behalf of the Defendant, at which  
hearing the Defendant was present with his  
attorney, and an opportunity having been  
given the Defendant and his counsel to cross-  
examine Commonwealth witnesses, and an  
opportunity having been given to the  
Defendant to present witnesses and the

APPENDIX "B"

Defendant not having taken advantage of this  
opportunity to either take the witness stand,  
or to present witnesses in his own behalf  
which facts do not prejudice his legal rights  
in any way, the court makes the following:

I. FINDINGS OF FACT

1. On January 19, 1985, at 12:50 A.M.  
Patrolman Steve Shallis of the Newtown  
Township Police Department observed a blue  
over silver Lincoln Continental in the right  
hand operating lane of Route 252. The  
vehicle was facing a green traffic signal at  
the intersection of Routes 252 and 3. It was  
stationary and remained so for 10-15 seconds  
before proceeding through the intersection.

2. Officer Shallis followed the subject  
vehicle as it proceeded north on Route 252 at  
25 M.P.H. in a 40 M.P.H. zone. He observed  
the vehicle swerve into the left hand passing  
lane, almost going into the medial strip, and  
then back, onto the right hand shoulder. The  
operator of the Lincoln activated his high  
beams, despite visual warnings from vehicles

proceeding in the opposite direction and continued to drive on the shoulder for approximately 100 feet before reentering the highway.

3. As the vehicle approached the intersection of Route 252 and Goshen Road the traffic signal at the intersection displayed a steady red signal. The vehicle continued toward this intersection and, as it began entering the intersection, the operator made an abrupt right hand turn onto Goshen Road, without stopping for the red signal. This turn was made in such a wide manner that the Lincoln was now proceeding eastbound in the west bound lane, and continued to do so for 150 feet.

4. Officer Shallis activated the red lights on his unmarked police vehicle and stopped the Lincoln at Goshen and Brookhaven Roads.

5. The operator of the vehicle exited it, stumbling as he did so, and walked very rapidly to the police vehicle.

6. Officer Shallis advised the operator to produce a driver's license and registration card for the vehicle. The operator turned and walked back toward his vehicle with Officer Shallis following him. The operator had difficulty removing his wallet from his pocket, however he handed Officer Shallis a Florida driver's license which identified him as Thomas A. Bruder, the Defendant.

7. Mr. Bruder informed Officer Shallis that he was going to his home in Springfield. The Officer detected a strong odor of an alcoholic beverage on Mr. Bruder's breath, and observed that his eyes were blood shot and his face was flushed.

8. Officer Shallis asked the Defendant if he could produce a registration card for the vehicle. Mr. Bruder went into the vehicle, opened the glove compartment, removed a large stack of papers and began fumbling through them, passing the registration card several times.

9. Officer Shallis requested that the

Defendant step out of the vehicle and repeated this request three times before the Defendant did so. He asked Mr. Bruder to walk a straight line, heel to toe, six steps forward, and then six steps back. The Defendant was unable to place one foot in front of the other and continued to walk forward for 15 steps until he walked into the police vehicle. As he walked back, Defendant continued to sway from side to side.

10. Officer Shallis asked the Defendant to recite the alphabet out loud. Defendant recited it by stating five or six letters at a time and hesitating before starting again.

11. Officer Shallis advised the Defendant that he was under arrest for operating a vehicle under the influence of alcohol. The defendant was placed in the rear of a police vehicle and was advised of his Miranda rights. Mr. Bruder responded by stating that he understood his rights.

12. The Defendant was transported to the Newtown Township Police Station for

processing. At the Police Station he was again advised of his Miranda rights. Officer Shallis requested Defendant to submit to a chemical test of his breath, blood, or urine to determine the alcohol content of his blood. He advised Mr. Bruder that he had the right to refuse, but that a refusal would result in a 12 months suspension of his operating privilege and that a refusal to submit to a chemical test would be used against Defendant in a court of law. The Defendant refused to submit to any chemical tests, stating that he understood the consequences of such a refusal.

## II. CONCLUSIONS OF LAW

1. The observations made by Officer Shallis as he followed the Defendant's vehicle on January 19, 1985 established sufficient probable cause to stop and administer field sobriety tests to the Defendant.

2. The field sobriety tests administered to the Defendant did not violate any of the Defendant's Constitutional Rights.

3. The statements and responses given by the Defendant were obtained pursuant to lawful inquiries and did not violate any Constitutional Rights of the Defendant.

4. The statements and responses given by the Defendant further established probable cause to arrest him.

5. The statements and responses elicited from the Defendant pursuant to the subject sobriety tests and inquiries are legally admissible at his trial subject to relevancy and other laws of evidence.

6. The nature and purpose of the suppression hearing and this Order shall not be disclosed by anyone to anyone, except the Court, the Defendant and Defendant's counsel.

7. The record made at the Suppression hearing shall be impounded until after final judgment.

BY THE COURT:

Rita E. Prescott, J.

IN THE COURT OF COMMON PLEAS OF  
DELAWARE COUNTY, PENNSYLVANIA  
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA :  
303-85

VS. :

THOMAS A BRUDER, JR. :

Joseph J. Mittleman, Esquire-Assistant District  
Attorney

Court House  
Media, PA 19063

Carmen P. Belefonte, Esquire-Attorney for  
Defendant

214 N. Jackson Street  
Media, PA 19063

PRESCOTT, J. Filed: May 14, 1986

O P I N I O N

Defendant, Thomas A. Bruder, Jr., was convicted by a judge sitting without a jury for the charges of Driving Under the Influence of Alcohol, Reckless Driving and Driving on Roadways Labeled for Traffic. Defendant filed a Motion for New Trial and A Motion in Arrest of Judgment. The issues raised by said motions are:

1) Whether the verdict was against the evidence and the weight of the evidence;

APPENDIX "C"

2) Whether the criminal complaint lodged against Defendant was so legally defective as to require a dismissal of the charges;

3) Whether certain statements made by Defendant and the results of certain field sobriety tests should have been suppressed where said statements and tests preceded the Miranda warnings given to Defendant.

This opinion is written in disposition of Defendant's post-trial motions and the issues raised therein.

The facts of the case established by testimony and other evidence are as follows:

On January 19, 1985, at or about 12:50 A.M., Patrolman Steve Shallis of the Newtown Township Police DEpartment observed a blue and silver Lincoln Continental in the right hand operating lane of Route 252 at the intersection with West Chester Pike. The vehicle was facing a green traffic signal at said intersection, however, the vehicle was stationary and remained so for about ten to

fifteen seconds before proceeding through the intersection. Officer Shallis followed the subject vehicle as it proceeded north on Route 252. The vehicle was travelling at a speed of 25 m.p.h. in a 40 m.p.h. zone and it swerved into the left hand passing lane, almost hit the medial strip and then went back across onto the right hand shoulder of the road. The operator of the subject vehicle activated his high beams despite visual warnings from vehicles proceeding in the opposite direction and the said vehicle continued to travel on the shoulder of the road for approximately 100 feet before reentering the highway. As the subject vehicle approached the intersection of Route 252 and Goshen Road, the traffic signal at said intersection displayed a steady red signal. The vehicle continued toward the intersection and, as it began entering the intersection, the vehicle made an abrupt right hand turn onto Goshen Road, without stopping for the red signal. The turn was made in such a wide

manner that the subject vehicle was proceeding eastbound in the westbound lane and continued to do so for approximately 150 feet.

At this point, Officer Shallis activated the red lights on his police vehicle and stopped the subject Lincoln at Goshen and Brookhaven Roads. The operator of the Lincoln exited from it, stumbling as he did so, and walked very rapidly toward the police car. Officer Shallis asked the operator to produce a driver's license and a registration card for the Lincoln. Defendant then went into his vehicle, opened the glove compartment, removed a large stack of papers and began fumbling through them, passing the registration card several times.

Defendant was then asked to step out of the vehicle and this request was repeated three times before Defendant complied. Officer Shallis asked Defendant to walk a straight line, heel to toe, six steps forward, and then six steps back. Defendant was

unable to place one foot in front of the other and continued to walk forward for 15 steps until he walked into the police vehicle. As he walked back, Defendant swerved from side to side.

Officer Shallis then requested Defendant to recite the alphabet out loud. Defendant recited it by stating five or six letters at a time and hesitated before starting again. Officer Shallis then advised Defendant that he was under arrest for operating a vehicle under the influence of alcohol. Defendant was placed in the rear of the police vehicle and was given his Miranda rights. Defendant responded by stating that he understood his rights.

Defendant was transported to the Newtown Township police station for processing. While at the station, Defendant was again advised of his Miranda rights. Officer Shallis requested Defendant to submit to a chemical test of his breath, blood or urine to determine the alcoholic content of

his blood. He advised Defendant that he could refuse a test, but that a refusal would result in a twelve month suspension of his operator's license and that a refusal to submit to a chemical test would be used against him in a court of law. Defendant refusal to submit to any chemical test, stating that he understood the consequences of such a refusal.

The first issue raised by Defendant's post-trial motions is: Whether the verdict was against the evidence and the weight of the evidence.

In support of the contention that the verdict was against the evidence, Defendant argues that the trial judge did not take into consideration defense expert testimony that Defendant had taken certain cold tablets, which alone could cause a person to exhibit symptoms of intoxication, and that such was the case here.

This court considered the expert testimony presented by Defendant. However,

this Court rejected such testimony as it was based upon testimony adduced from Defendant which testimony this Court did not find to be credible. Comm. v. Shaver, 501 PA. 167, 460 A.2d 742 (1983).

In addition to all the facts as hereinbefore set forth, this Court relied upon certain other evidence in rejecting Defendant's version of what occurred on the night in question. When taken to the police station, Defendant told the police that he had not been drinking. At trial, Defendant admitted that he had been drinking. (N.T. pp. 25, 75-76). On the night in question, Defendant told the police he was going home, but at trial, Defendant testified that he was going to a country club. (N.T. pp. 24, 79). At the time of his arrest, Defendant told the police that he was not ill, yet at trial, Defendant testified that he was ill that night and felt dizzy. (N.T. pp. 26, 128). Furthermore, Defendant's behavior on the day of his arrest is not consistent with his

testimony that he was feeling ill on the day in question. He had spent six hours at a country club, had several drinks, danced and played cards - after a full day of work.

In light of the Commonwealth's overwhelming evidence as set forth above and viewing said evidence in the light most favorable to the Commonwealth, Comm. vs. Macolino, 503 PA. 201 469 A.2d 132 (1983), this Court is of the opinion that there is legally sufficient evidence on the record to sustain Defendant's guilt beyond a reasonable doubt.

The second issue raised by Defendant is: Whether the criminal complaint lodged against Defendant was so legally defective as to require a dismissal of the charges.

Defendant contends that the criminal complaint filed against him did not contain a verification by the arresting officer that the facts set forth in the complaint were true and correct according to the arresting officer's knowledge, information and belief

and that any false statements in the complaint would be subject to the penalties of Section 4904 of the Crimes Code relating to unsworn falsification. As a result, Defendant contends that the instant complaint is violative of Pa. R. Crim. Proc. 132 and, thus, null and void.

Defendant also contends that since the averments contained in the complaint were not sworn to and subscribed by the arresting officer in the presence of the district justice involved, the complaint is null and void since it is violative of Pa. R. Crim. Proc. 134.

Before proceeding to review the merits of Defendant's contentions, the following factual background is set forth:

Defendant was arrested without a warrant January 19, 1985, at or about 12:50 A.M., and was released from custody at or about 3:00 A.M. On January 24, 1985, the arresting officer prepared and signed a criminal complaint for the issuance of a summons against Defendant. Said criminal

complaint was left at the office of a district justice on the same day, for the district justice's signature. The district justice executed the complaint on the same day sometime between 1:00 P.M. and 4:30 P.M. The arresting officer did not personally appear, sign or swear to the complaint in the presence of the district justice.

With regard to the verification procedures set forth in Pa. R. Crim. Proc. 132, the subject rule provides as follows:

"Every complaint shall contain:

(9) a verification by the affiant that the facts set forth in the complaint are true and correct to the affiant's personal knowledge or information and belief, and that any false statements therein are made subject to the penalties of Section 4904 of the Crimes Code (18 P.C.S. §4904), relating to unsworn falsification to the authorities."

The above-cited rule became effective on January 2, 1985. Prior to said date, an affiant was required to appear before the district justice and to swear to the averments in the complaint.

In the case at hand, the arresting

officer, in drawing up the complaint, used the only form available to him, to wit, the old form which was designed to comply with Rule 132 prior to the amendment of said rule. As a result, the form used in the instant case did not contain a statement that any false statements were subject to the penalties of §4904.

As discussed hereinafter, Pa. R. Crim. Proc. 134 was also amended effective January 2, 1985, and eliminated the requirement that an affiant personally appear and swear to the averments of a complaint before the district justice involved in the case. In light of the aforesaid amendment(s) it is the opinion of this Court that the absence of the verification statement in the subject complaint constitutes a procedural defect where it appears that all other provisions of the rules of criminal procedure have been complied with. In this case, the subject defect in no way affected the purpose of the rules regarding the issuance of a summons

which is to put a defendant on notice of the charges lodged against him.

In support of this conclusion, this Court relies upon Pa. R. Crim. Proc. 150 which provides as follows:

"a defendant shall not be discharged nor shall a case be dismissed because of a defect in the form or content of a complaint, summons or warrant, or a defect in the procedures of this Chapter, unless the defendant raises the defect before the conclusion of the preliminary hearing and the defect is prejudicial to the rights of the defendant."

The alleged defect was not raised in this case until after both the preliminary hearing and suppression hearing. Defendant was always well aware of the nature of the charges against him and he has not demonstrated any prejudice against him resulting from the complaint lodged in this case. In the opinion of this Court, Defendant's contention on this point was not timely raised and lacks sufficient merit to warrant a dismissal of the charges.

Defendant also contends that the complaint is null and void because the

averments contained in the complaint were not sworn to and subscribed by the arresting officer in the presence of the district justice.

As noted above, Pa. R. Crim. Proc. 134 was amended, effective January 2, 1985, and the requirement that an arresting officer personally appear before a district justice to swear to and subscribe his name to the averments in the complaint was entirely eliminated. As a result, this Court finds no merit in Defendant's contention on this point.

The third issue raised by Defendant's post-trial motions is: Whether certain statements made by Defendant and the results of the field sobriety tests should have been suppressed where said statements and tests preceded the Miranda warnings given to defendant.

Subsequent to Defendant's car being stopped, Officer Shallis asked Defendant where he was going. Defendant responded that he was going home. When stopped, Defendant was asked whether he had been

drinking to which he responded that he had.

Defendant's contention that these statements should have been suppressed because they were made prior to any Miranda warnings is not well-founded. The questions asked by Officer Shallis were not intended to nor expected to elicit incriminating information nor did they constitute custodial interrogation. Instead, the officer was merely seeking preliminary information after seeing Defendant's erratic driving. Such questions do not require any prior Miranda warnings. Comm. v. Davis, 460 PA. 37, 331 A.2d 406 (1975).

Defendant's statement, "You don't know who I am." was admitted into evidence over objection of counsel. This statement was not made in response to a question, but was a spontaneous utterance by Defendant. As such, the admission of the statement into evidence did not violate Defendant's right against self-incrimination. Comm. v. Bracey, 501 PA. 356, 461 A.2d 775 (1983).

With regard to the results of the field sobriety tests, the law is clear in Pennsylvania that Miranda warnings are not required before the administration of field sobriety tests because such tests are physical in nature rather than testimonial and, therefore, do not violate the right against self-incrimination. Comm v. Benson, 280 PA. Super. 20, 421 A.2d 383 (1980); Comm v. Kloch, 230 PA. Super. 563, 327 A.2d 375 (1974).

In light of all the foregoing facts and legal authorities cited, this Court has entered an Order dated the 9th day of May, 1986, dismissing Defendant's post-trial motions.

BY THE COURT:

Rita E. Prescott, J.

J. 01010/87

COMMONWEALTH OF PENNSYLVANIA

v.

THOMAS A. BRUDER, JR.,  
Appellant

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

NO. 02176 PHILADELPHIA 1986

# JUDGMENT

On Consideration Whereof, it is now  
here ordered and adjudged by this Court that

the judgment of the Court of Common Pleas  
of Delaware County be, and the same is  
hereby reversed and remanded. Jurisdiction  
relinquished.

BY THE COURT:

~~DAVID A. SZEWCZAK~~  
Prothonotary

Dated March 30, 1987

APPENDIX "D"

COMMONWEALTH OF PENNSYLVANIA

v.

THOMAS A BRUDER, JR.,  
Appellant

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

NO. 02176 PHILADELPHIA 1986

Appeal from the Judgment of Sentence July  
23, 1986 in the Court of Common Pleas of  
Delaware County, Criminal No. 303 of 1985.

BEFORE: CIRILLO, P.J., ROWLEY AND  
HOFFMAN, JJ.

OPINION BY CIRILLO, P.J.:

This is an appeal from a judgment  
of sentence, following a non-jury trial, for  
driving under the influence of alcohol and  
related offenses. We reverse and remand.

The issues presented for our review  
are: (1) whether the criminal complaint should  
have been dismissed due to its defects; (2)  
whether certain evidence was properly  
admitted at trial; and (3) whether the verdict  
was supported by sufficient evidence.

The record indicates that a  
patrolman stopped appellant Bruder's car after

the officer saw him pass a red light. The patrolman also witnessed what he described as Bruder's erratic driving behavior. When the policeman approached Bruder, he noticed indicia of intoxication. The patrolman testified that Bruder was unable to walk in a straight line, heel to toe, or recite the complete alphabet. Appellant was then arrested for driving under the influence of alcohol, and informed of his rights as required by Miranda v. Arizona, 384 U.S. 1436, 467-73 (1966).

## I

Appellant argues that the complaint filed against him was defective and, therefore, should have been dismissed. More specifically, appellant asserts that the complaint filed in the instant case violated Pennsylvania Rules of Criminal Procedure 132 and 134.

The alleged violation by the Commonwealth of Rule 132 was its failure to include a verification with the complaint.

Rule 132(9) requires that every complaint include a "verification by the affiant that the facts set forth in the complaint are true and correct to the affiant's personal knowledge or information and belief, and that any false statements therein are made subject to the penalties . . . relating to unsworn falsification to authorities . . ."

In the case at bar, the arresting officer, in filing the complaint, used an old form which was designed to conform to an older version of Rule 132. The complaint filed in the instant case did not conform to the current version of Rule 132 because it did not contain the required clause that false statements were subject to the penalties of unsworn falsification.

The trial court found that based on Pa. R. Crim. P. 150, the defect in the complaint did not warrant dismissal of the charges. Pa. R. Crim. P. 150 provides that a "defendant shall not be discharged nor shall a case be dismissed because of a defect in the

form or content of a complaint, summons or warrant, or a defect in the procedures of this chapter, unless the defendant raises the defect before the conclusion of the preliminary hearing and the defect is prejudicial to the rights of the defendant."

The trial court noted that the defect concerning the absence of a verification was not raised in this case until after the preliminary hearing and suppression hearing. The trial court also observed, and we agree, that the appellant was aware of the charges against him and was not prejudiced by the defect in the complaint.

We express displeasure with the failure of the police to fully comply with the requisite form of a complaint. The plain language of Rule 150, however, does not permit us to discharge the complaint in this particular case because the defect was neither timely raised nor was it prejudicial to the appellant.

Appellant also contends that Pa.

R. Crim. 134 was violated. Rule 134 provides that in any proceeding initiated by an complaint, the issuing authority shall ascertain and certify on the complaint that there is probable cause, in the form of an affidavit, for the issuance of process.

Notwithstanding appellant's assertion to the contrary, we discern no language in the rule, or in the comments to the rule, which require the police to personally appear and verify the complaint before the district justice involved in the case. Because we find no violation of Rule 134, we cannot dismiss the complaint on this basis.

Appellant also argues that the defective complaint was a violation of Pa. R. Crim. P. 130(d). We need not address this argument due to our holding that there were no fatal defects in the instant complaint.

## II

Bruder argues that certain statements that he made after he was

stopped, as well as the results of the field sobriety test, should have been suppressed.

When appellant's car was stopped, appellant stepped out and approached the police vehicle. The police officer asked appellant for his driver's license, registration and insurance card. Appellant returned to his car to obtain the requested information. After appellant had provided this information, the police officer asked appellant whether he had been drinking and appellant responded that he had. The police officer also asked appellant where he was going. Appellant responded that he was going home. Bruder argues that these responses should be suppressed because they were made before he was advised of his rights pursuant to Miranda v. Arizona, 384 U.S. 436, 444 (1966); Berkemer v. McCarty, 468 U.S. 420, 428-29 (1984). In order to determine whether the responses made by appellant before he received his Miranda warnings should have been suppressed, we must decide whether they were

elicited during custodial interrogation.

In Berkemer v. McCarty, 468 U.S. 420 (1984), the United States Supreme Court ruled that a motorist was not in custody when he was stopped by a police officer who asked "a modest number of questions and requested him to perform a simple balancing test visible to passing motorists." 468 U.S. at 442. As in the case at bar, the driver in McCarty was stopped after being suspected of driving under the influence of alcohol, admitted that he had a few drinks, and failed a balancing test before being advised of his Miranda rights. The Court in McCarty, however, refused to adopt a bright line test which would have definitively answered the question of whether Miranda applies of his rights only when he is formally placed under arrest. 468 U.S. at 441. Thus, we are afforded a measure of flexibility in deciding exactly when a suspect has been taken into custody.

In Pennsylvania, "custodial

interrogation does not require that police make a formal arrest, nor that the police intend to make an arrest . . . Rather, the test of custodial interrogation is whether the individual being interrogated reasonable believes his freedom of action is being restricted." Commonwealth v. Meyer, 488 Pa. 297, 307, 412 A.2d 517, 521 (1980) (quoting Commonwealth v. Brown, 473 Pa. 562, 570, 375 A.2d 1260, 1264 (1977)). Interrogation in this context is defined as questioning "expected to elicit a confession or other incriminating statements." Commonwealth v. Bracey, 501 Pa. 356, 367, 461 A.2d 775, 780 (1983) (quoting Commonwealth v. Sero, 478 Pa. 440, 453, 387 A.2d 63, 70 (1978)).

In Commonwealth v. Meyer, *supra*, the Pennsylvania Supreme Court ruled that the driver of a car involved in an accident who was suspected of driving under the influence of alcohol and who was told by police to wait at the scene until additional police arrived, was in custody for purposes of

Miranda. The Meyer court reasoned that because the defendant had a reasonable belief that his freedom of action had been restricted, statements elicited before he received his Miranda warnings should have been suppressed. 488 Pa. at 307, 412 A.2d at 522. See generally Annotation, Right of Motorist Stopped by Police Officers To Be Informed at That Time of His Federal Constitutional Rights Under Miranda v. Arizona, 25 A.L.R. 3d 1076 (1969) (cases collected).

We rely on Meyer in finding that Bruder reasonably believed that his freedom of action had been restricted. Undoubtedly, he was not free to leave when he made the statements elicited. That the policeman's questions were intended to elicit incriminating statements remains obvious. We cannot readily accept an alternative reason why Bruder was asked if he had been drinking. Thus, based on the reasoning in the Meyer case, we conclude that Bruder's response that

he had been drinking should have been excluded as a statement made during custodial interrogation without the benefit of Miranda warnings. Meyer, 488 Pa. at 307, 412 A.2d at 522. See generally McCarty, 468 U.S. at 441 n.34 (United States Supreme Court cites Meyer in connection with discussion which intimates that duration of and circumstances surrounding traffic stop impact on the determination of whether there was a custodial interrogation for purposes of providing Miranda warnings.) As we have established that custodial interrogation existed at the point Bruder was asked whether he had been drinking, the subsequent response concerning his destination should also have been excluded.

Bruder's statement, "You don't know who I am," was admitted into evidence over the objection of counsel. Although this statement was made before Bruder received his Miranda warnings, it was a spontaneous utterance not made in response to a question

by the police officer. In Commonwealth v. Bracey, 501 Pa. 356, 461 A.2d 775 (1983), the Pennsylvania Supreme Court ruled that a statement is admissible notwithstanding the lack of Miranda warnings if it was not given in response to police conduct which evoked an admission, or if it was freely given without compelling influences. Id. at 367, 461 A.2d at 780 (quoting Commonwealth v. Sero, 478 Pa. 440, 453, 387 A.2d 63, 70 (1978)). It is clear from the record that this particular statement by Bruder was freely made in the absence of evocative police conduct. Therefore, it was properly admitted.

After appellant informed the police officer that he had had a few drinks, the police officer asked the appellant to recite the alphabet and to walk in a straight line, heel to toe. Appellant argues that these field sobriety tests should be suppressed. It is settled in Pennsylvania that "(r)equiring a driver to perform physical tests . . . does not violate the privilege against self-

incrimination because the evidence procured is of a physical nature rather than testimonial, and therefore, no Miranda warnings are required." Commonwealth va. Benson, 280 Pa. Super. 20, 29, 421 A.2d 383, 387 (1980).

Although requiring Bruder to walk in a straight line was a physical test which need not have been preceded by Miranda warnings, we cannot readily reach the same conclusion regarding Bruder's recitation of the alphabet. Whereas the constitutional protection against self-incrimination which Miranda was designed to protect does not encompass physical evidence, it does refer to testimonial evidence. Benson, 280 Pa. Super. at 29, 421 A.2d at 387. "Testimonial evidence is communicative evidence as distinguished from demonstrative or physical evidence." Commonwealth v. Fernandez, 333 Pa. Super. 279, 284, 482 A.2d 567, 569 (1984).

We view the recitation of the alphabet as essentially communicative in nature. Therefore, because the recitation was

elicited before Bruder received his Miranda warnings, it should have been excluded as evidence. Benson, 280 Pa. Super. at 29, 421 A.2d at 387 (citing United States v. Wade, 388 U.S. 218 (1967); Schmerber v. California, 384 U.S. 757 (1966)). See Miranda, 384 U.S. at 479.

In order to reverse on the basis of the introduction of inadmissible evidence, we must find an abuse of discretion as well as a showing of actual prejudice resulting from the tainted evidence. Commonwealth v. Sweger, 351 Pa. Super. 188, 195, 505 A.2d 331, 334 (1986) (citing Lewis v. Prewitt, 337 Pa. Super. 419, 487 A.2d 16 (1985)). See also Commonwealth v. Smoyer, 505 Pa. 83, 88, 476 A.2d 1304, 1307 (1984) (effect of tainted evidence); Commonwealth v. Johnson, 227 Pa. Super. 96, 102-03, 323 A.2d 813, 816 (1974) (same).

Based on our analysis which determined that evidence obtained during Bruder's custodial interrogation was

inadmissible, we hold that it was an abuse of discretion to admit such evidence. Introduction of the tainted evidence was clearly prejudicial to Bruder because the absence of such evidence might very well have led to a different verdict. Thus, we must reverse and remand for proceedings consistent with this opinion. 1

Reversed and remanded.

Jurisdiction relinquished.

ROWLEY, J. FILES A CONCURRING AND  
DISSENTING STATEMENT

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1 This disposition precludes the need to address the remaining issue.

COMMONWEALTH OF PENNSYLVANIA

v.

THOMAS A. BRUDER, JR.,  
Appellant

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

NO. 2176 Philadelphia, 1986

Appeal from the Judgment of Sentence July 23, 1986, in the Court of Common Pleas of Delaware County, Criminal Division, No. 303 of 1985.

BEFORE: CIRILLO, P.M., ROWLEY, and  
HOFFMAN, JJ.

CONCURRING AND DISSENTING STATEMENT  
BY ROWLEY, J.:

While I agree with the majority's disposition of the issue concerning dismissal of the criminal complaint, I respectfully disagree with the conclusion that appellant's statements should have been suppressed under Commonwealth v. Meyer, 488 Pa. 297, 412 A.2d 517 (1980). I think that Meyer is distinguishable on its facts and that the facts in this case closely parallel those in Berkemer v. McCarty, 468 U.S. 420 (1984). Considering

also that the U.S. Supreme Court cited Meyer, as an example of the confusion among various jurisdictions in applying Miranda v. Arizona, 384 U.S. 436 (1966) to situations involving motorists stopped for traffic violations, I think that Berkemer is controlling in this case.

Because I think that the trial court has also adequately discussed and correctly decided appellant's issue concerning the sufficiency of the evidence, I would affirm the judgment of sentence.

## COMMONWEALTH OF PENNSYLVANIA

v.

THOMAS A. BRUDER, JR.,  
Appellant

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

NO. 2176 Philadelphia, 1986

ORDER OF COURT

AND NOW, this 8th day of June, 1987, the petition for reargument is denied. However, panel reconsideration is granted on the limited issue of the sufficiency of the evidence.

Per Curiam-----

APPENDIX "F"



# Supreme Court of Pennsylvania

## Eastern District

May 19, 1988

MARLENE F. LACHMAN, ESQ.  
PROTHONOTARY  
PATRICK TASSOS  
DEPUTY PROTHONOTARY

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Media, Pa. 19063

RE: Commonwealth of Pennsylvania, Petitioner v.  
Thomas A. Bruder, Jr.  
No. 650 E.D. Allocatur Docket 1987

Dear Counsel:

This is to advise you that the following Order has been endorsed on  
your Petition for Allowance of Appeal, filed in the above captioned matter:

"May 19, 1988.

DENIED.

Per Curiam".

Very truly yours,

PATRICK TASSOS  
Deputy Prothonotary

/ma

cc: Stuart Suss, Esquire  
Carmen P. Belefonte, Esquire

APPENDIX "F"